88-881 (1)

Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

GERT VON MARSCHNER,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GERT VON MARSCHNER
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QUESTIONS PRESENTED FOR REVIEW

1. Was the lower court in conflict with the established law of the issue when upholding a determination that the warrantless within protected curtilage was not offensive to the constitution based upon facts and circumstances?

2. Did the lower court depart from the established totality of the circumstances and objective standard in practice when finding that Von Marschner would have felt free to terminate his encounter with police and was not lured or coerced into exiting his dwelling?

3. Did the lower court fail to weigh the totality of circumstances as demanded by established law and to hold the government to the burden of proof concerning consent to search?

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IN THE

SUPREME COURT OF THE UNITED STATES

GERT VON MARSCHNER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Gert Von Marschner, in propria persona, does respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION OF THE COURT BELOW

Gert Von Marschner appealed his criminal conviction pro se, following entry of a conditional plea to violation of Title 21, United States Code, §§ 846, 841(d)(2). Von Marschner raised two principle issues in his direct appeal: (1) that the warrantless arrest at his residence was invalid; and, (2) that his consent to the search of his house was involuntary.

The Court of Appeals found that the district court did not err in concluding that Von Marschner was not lured or coerced out of his house, and that he was arrested after he stepped outside; further, that there were insufficient facts in the record to determine whether Von Marschner's house patio was curtilage, and that the Court need not address this issue

raised for the first time on appeal. Hence, the Court of Appeals affirmed as to the issue of the warrantless arrest.

As to the issue of consent to to search, it was found the district court was not clearly erroneous in determining that Von Marschner did freely and voluntarily consent to that search.

In summary, the Court of Appeals found that the district court properly denied Von Marschner's motion to suppress and affirmed the judgment. United States v. Gert Von Marschner, Case No. 86-5334 (9th Cir. 1988).

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Petitioner Gert Von Marschner was adjudged guilty and convicted in the United States District Court for the Central District of California on December 8, 1986, in Docket Nos. CR86-0643-2-HLH and CR86-0643(A)-HLH, of violating 21 USC 846 and 26 USC 7203, respectively. **Appendix at 1 & 4.** Von Marschner was sentenced to one (1) year imprisonment, three (3) years probation, and special assessment fees of $75.00, cumulative. **Id.** Von Marschner filed a timely Notice of Appeal. **Appendix at 7.** On June 16, 1988, the United States Court of Appeals for the Ninth Circuit filed their Memorandum affirming conviction and sentence. **Appendix at 9.** An Order was issued by the Ninth Circuit denying Von Marshcner's petition for rehearing

and rejecting his suggestion for rehearing en banc, on August 30, 1988. **Appendix at 27.** The Ninth Circuit did affirm the judgment of the District Court, such Order filed on September 13, 1988. **Appendix at 29.**

Title 28, United States Code, Section 1254, does confer on this Court jurisdiction to review the judgment of the United States Court of Appeals for the Ninth Circuit in United States of America v. Gert Von Marschner, Case No. 86-5334.

CONSTITUTIONAL PROVISION WHICH THE CASE INVOLVES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation particularly describing the place to be searched, and the person or things to be seized.

U.S. Constitution, Amendment IV.

STATEMENT OF THE CASE

In March, 1986, police commenced an investigation into the illegal sale of piperidine, a PCP precursor, after having received an informer's tip that co-defendant Earl Hunter had sold several gallons of the chemical. Undercover agents began negotiating with Hunter for the purchase of the illegal piperidine. On four separate occasions between March and May, 1986, undercover agents purchased multi-gallon quantities of piperidine from Hunter.

On July 1, 1986, a purchase and delivery of piperidine was arranged between Hunter and undercover agents. A search warrant was issued for Hunter's home, and Anodizing Industries, Inc., a company owned by Von Marschner. Prior to the delivery of the piperidine, Von Marschner was purportedly observed

meeting with Hunter and transfering cans from Von Marschner's car to Hunter's vehicle. Von Marschner and Hunter departed in opposite directions. Hunter was arrested following delivery of the piperidine to undercover agents. Von Marschner was followed to his home.

Von Marschner's arrest took place at approximately 9:30 p.m., at his home. Von Marschner had prepared to sit at his table for supper when law enforcement officials rang his door bell and commenced loud knocking upon his door. Upon opening his door he was confronted with approximately six agents, one directly in front of him, one at either side, while the others were standing in the dark. Von Marschner was asked to identify himself, and the DEA agents identified themselves as such. Von Marschner was asked to step

outside his home, whereupon, he was formally arrest, handcuffed, advised of his constitutional rights, and was detained on his patio while agents entered his dwelling. Von Marschner did invoke his right to counsel upon his formal arrest and many times there after. Von Marschner was questioned as to whether he would provide consent to search after he had invoke his right to counsel. Von Marschner was not informed that he had the right to refuse consent. No attempt was made by law enforcement officials to obtain a search warrant for Von Marschner's home.

The district court ruled at the suppression hearing that statements made by Von Marschner which he did not initiate would be suppressed under Edwards v. Arizona, 451 U.S. 447 (1981). This court also ruled that the execution

of the search warrant for Anodizing Industries, Inc., had been overbroad, and consequently suppressed and ordered returned approximately 985 of the 1000 documents which had been seized.

I.

THE LOWER COURT IS IN CONFLICT WITH THE ESTABLISHED LAW OF THE ISSUE WHEN UPHOLDING A DETERMINATION THAT THE WARRANTLESS ARREST WITHIN PROTECTED CURTILAGE WAS NOT OFFENSIVE TO THE CONSTITUTION BASED UPON FACTS AND CIRCUMSTANCES

Curtilage is a factor that should receive consideration in the de novo review of a denial of a motion to suppress. The concept of curtilage does play a part in interpreting the reach of the Fourth Amendment. United States v. Dunn, 480 U.S. -- , 94 L.Ed.2d 326, 334 (1987). See also, Oliver v. United States, 466 U.S. 170, 180 (1984).

In Dunn, the Court provided a four factor questioning method whereby an analysis might be undertaken for a determination as to whether the area in question is so intimately tied to the home as to be place under the

"umbrella" protection of the Fourth Amendment. Dunn, supra, 94 L.Ed.2d at 334-335. Von Marschner did provide the Court with a detailed analysis in support of his claim that the area in which the police intruded was in fact protected curtilage. Appellent Von Marschner's Opening Brief at 16-18.

The lower court dismissed Von Marschner's protected curtilage claim as being raised for the first time on appeal, Memorandum Opinion, at 6-7, stating that there were insufficient facts in the record to determine whether the patio was curtilage. Id.

Von Marschner's claim, of such fundamental constitutional nature, would have commanded review by the lower court to prevent a miscarriage of justice and to preserve the integrity

of the judicial system. Hormel v. Helvering, 312 U.S. 552, 556-557 (1960); Erie v. Tompkins, 304 U.S. 64 (1938).

With appropriate means available to the lower court, see Federal Rule of Appellate Procedure 10(e), and in conformity with established law, remand should have been necessitated for the protected curtilage not to be offense to the Fourth Amendment's proscriptions.

II.

THE LOWER COURT DEPARTED FROM THE ESTABLISHED TOTALITY OF THE CIRCUMSTANCES AND OBJECTIVE STANDARD IN PRACTICE WHEN FINDING THAT VON MARSCHNER WOULD HAVE FELT FREE TO TERMINATE HIS ENCOUNTER WITH POLICE AND WAS NOT LURED OR COERCED INTO EXITING HIS DWELLING

In United States v. Mendenhall, 466 U.S. 544, 554 (1980), the Court developed a test to determine when a police-citizen encounter is to be found sufficiently coercive to be considered a seizure. Under Mendenhall, a seizure occurs when, under the totality of the circumstances, a reasonable person would have believed he was not free to leave an encounter with police. See also, FLorida v. Royer, 460 U.S. 491 (1983); INS v. Delgado, 466 U.S. 216 (1984). This rule requires a factual review, based on an objective

standard, of police conduct and the surrounding circumstances for evidence that the police restricted the suspect's freedom, or otherwise acted in coercive a manner. Also, Sibron v. New York, 392 U.S. 40, 67 (1968).

It was established during lower court proceedings that Von Marschner was within his home preparing for supper when police announced themselves at his front door with lound knocking and ringing of his door bell. There were no exterior lights beckoning strangers or the public to his door, that his door was secluded from the public view, and that the method of announcement at the late hour after sunset was a pronouncement of urgency. It was also established that upon opening his door, Von Marschner was confront with six-seven persons who

identified themselves as agents of the Drug Enforcement Administration, demanded Von Marschner identify himself and exit from him home.

Von Marschner could not, in the light of late night distinguish whether those officers standing farther away from him had guns drawn or not.

This late night intrusion could not have lead a reasonable person to believe that he was free to terminate his encounter with police and retreat into his dwelling. See, United States v. Palmer, 603 F2d 1286, 1288 (8th Cir. 1978)(A seizure may be obtained by a sufficient show of authority); United States v. Morgan, 743 F2d 1158, 1166 (6th Cir. 1984), cert. denied, -- U.S. -- , 105 S.Ct. 2126, 85 L.Ed.2d 490 (1985); United States v. Edmonson, 791 F2d 1512 (11th Cir. 1986).

The lower court, while stating that a determination under an objective standard was required, in practice did fail to apply that standard in context of the circmstances in relation to the "reasonable" thinking of a man in Los Angeles' 1984 enviorment.

III.

THE LOWER COURT FAILED TO WEIGH THE THE TOTALITY OF CIRCUMSTANCES AS DEMANDED BY ESTABLISHED LAW AND TO HOLD THE GOVERNMENT TO THE BURDEN OF PROOF WHEN CONSIDERING THE ISSUE OF CONSENT TO SEARCH

In Schneckloth v. Bustamente, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), the Court ruled that whether consent to search was in fact to be found "voluntary", or was the product of duress or coercion, implied or express, is a question of fact to be determined from the totality of the circumstances. Id., 412 U.S. at 227. The prosecution has the burden to prove a vaild consent. Id., 412 U.S. at 222.

Von Marschner did establish in the lower courts that: (1) there was in fact a display of massed police authority; (2) Von Marschner could

not tell whether police officers were in fact armed as many were confined to the shadows of his yard; (3) law enforcement officer had already entered his home prior to the request for consent; (4) Von Marschner was isolated from family or other persons and was restrained by handcuffs; (5) even though Von Marschner had request counsel and had invoke his Miranda rights, he was denied counsel and questioned as to consent; (6) Von Marschner feared for his family and his property and was unable while restrained and isolated to defend either; (7) Von Marschner was not informed that he had the right to refuse consent to search of his home; and, (8) the late night intrusion on to his property deprived Von Marschner of passer-bys or other traffic which might have seen his situation and provided witness.

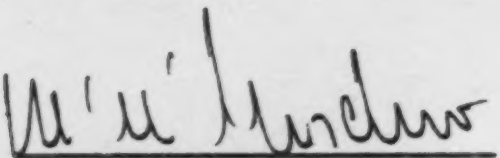
The lower court did fail to hold the prosecution to the burden of proof of consent and made their determination without offer of proof that consent was made in such manner as to over come the afore described circumstances.

IV.

CONCLUSION

Petitioner Gert Von Marschner, in propria persona, would pray that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, based upon the established record of this case, the established law, and the aforegoing.

Respectfully submitted,



Gert Von Marschner
1818 S. Flower Street
Los Angeles, CA 90015

JUDGMENT AND PROBATION/COMMITMENT ORDER

UNITED STATES DISTRICT COURT

FOR THE

CENTRAL DISTRICT OF CALIFORNIA

DOCKET NO. CR86-0643-2-HLH

DEFENDANT: GERT VON MARSCHNER

COUNSEL

In the presence of the attorney for the government the defendant appeared on this date, December 8, 1986, with counsel Michael Nasatir, retnd.

PLEA

Guilty.

FINDING AND JUDGMENT

Defendant has been convicted as charged of the offense(s) of conspiracy to possess piperidine in violation

of 21 USC 846 as charged in count one of the indictment. (AS PART OF CR86-0643(A)-HLH).

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one (1) year. Further, defendant is ordered to pay a special assessment fee of $50.00 to the U.S. Treasury, c/o U.S. Attorney, 312 N. Spring St., Rm. 1347 (Claims & Judgments), Los Angeles, Ca 90012, pursuant to 18 USC 3013(a).

Defendant to voluntarily surrender to the designated institution or the U.S. Marshal by noon, on January 5, 1987. Upon surrender, bond is to be exonerated.

By: /s/ Harry L. Huff
U.S. District Judge

Date: December 9, 1986

JUDGMENT AND PROBATION/COMMITMENT ORDER

UNITED STATES DISTRICT COURT

FOR THE

CENTRAL DISTRICT OF CALIFORNIA

DOCKET NO. CR86-0643(A)-HLH

DEFENDANT: GERT VON MARSCHNER

COUNSEL

In the presence of the attorney for the government the defendant appeared on this date, December 8, 1986, with counsel Michael Nasatir, retnd.

PLEA

Guilty.

FINDING AND JUDGMENT

Defendant has been convicted as charged of the offense(s) of failure to supply information in violation

of 26 USC 7203 as charged in the one count information. (IN ADDITION TO CR86-0643-2-HLH).

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, the court adjudged the defendant guilty as charged and convicted and ordered that: Imposition of the sentence is suspended and defendant is place on three (3) years probation with supervision to commence upon defendant's release from custody in criminal action CR86-0643-2-HLH, upon the following terms and conditions:

1. That defendant comply with the rules and regulations of the probation office and General Order 225.

Defendant is further ordered to pay a special assessment fee of $25 to the U.S. Treasury, c/o U.S. Attorney, 312 N. Spring St., Room 1347 (Claims & Judgmnets), Los Angeles, Ca 90012 pursuant to 18 USC 3013(a).

By: /s/ Harry L. Hupp
U.S. District Judge

Filed: December 1, 1986

UNITED STATES DISTRICT COURT

FOR THE

CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CR 86-0643-HLH-2

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GERT VON MARSCHNER,
Defendant.

NOTICE OF APPEAL

Notice is hereby given that defendant Gert Von Marschner appeals to the Court of Appeals for the Ninth

Circuit from the judgment and conviction entered in the above captioned criminal on December 8, 1986.

/s/ Gert Von Marschner

Filed: December 8, 1986

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 86-5334

UNITED STATES OF AMERICA
Plaintiff-Appellee,

vs.

GERT VON MARSCHNER,
Defendant-Appellant

MEMORANDUM*

On Appeal from the United States
District court for the Central
District of California
Harry L. Hupp, District Judge, **
Presiding, Submitted May 13, 1988

Before: Barnes, Kilkenny, and Goodwin, Circuit Judges.

Gert Von Marschner appeals pro se his conviction, following a conditional guilty plea, for conspiracy to possess piperdine[1] in violation of 21 U.S.C. §§ 846, 841(d)(2). Von Marschner challenges the district court's denial of him motion to suppress evidence seized in a post-arrest search of his house. He contends that the warrantless arrest at his residence was invalid; he further

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except as provided by Ninth Circuit Rule 36-3.

**The panel unanimously finds this case suitable for disposition without oral argument. Fed.R.App. 34(a), Ninth Circuit Rule 34-4.

[1]Piperdine is used to make the controlled substance phencyclidine (PCP). See United States v. Wilson, 781 F2d 1438 (9th Cir. 1986).

contends that his consent to the search of his house was involuntary. We affirm.

In March, 1986, the Drug Enforcement Administration (DEA) began an investigation into the illegal sale of piperidine by appellant Gert Von Marschner and co-defendant Earl Hunter. On July 1, 1986, the police arrested co-defendant Hunter after they observed Hunter receive piperidine from Von Marschner and then deliver it to an undercover agent. After his arrest, Hunter admitted illegally selling piperidine; he stated that he obtained the piperidine from Von Marschner and then shared the profits from the sale with him.

After the police observed Von Marschner deliver the piperidine to Hunter, they followed Von Marschner

to his residence. DEA Agent Barkett and six other officers proceeded to the front door of Von Marschner's house. After Von Marschner opened the door, Agent Brakett identified himself and asked Von Marschner to identify himself and to step outside. After Von Marschner stepped outside, he was placed under arrest and advised of his constitutional rights; Von Marschner invoked his right to have an attorney present. Agent Barkett then asked Von Marschner for consent to search the house. Von Marschner consented orally and in writing to a search of his house and automobiles.

On July 22, 1986, Von Marschner and co-defendant Hunter were indicted for conspiracy to possess piperidine and possession of piperidine. Von Marschner moved to suppress the evidence seized by the agents during the search

of his residence; he contended that the evidence was obtained as a result of an unlawful arrest and search. The district court denied his suppression motion, and Von Marschner entered a conditional guilty plea to one count of conspiracy to possess piperdine. He was sentenced to one year in custody. Von Marschner timely appeals.

I. Validity Of Warrantless Arrest

Von Marschner principally contends that the district court erred in finding that his warrantless arrest was vaild. Specifically, he asserts that he was lured outside of his residence by police force, and was thus constructively arrested inside his house.

This court reviews the district court's denial of a motion to suppress de novo. United States v. Andrade, 784

F2d 1431, 1433 (9th Cir. 1986). The Fourth Amendment prohibition against the unreasonable seizure of an individual requires arrests to be based on probable cause. See United States v. Watson, 423 U.S. 411, 418-424 (1976). Where there is probable cause, an agent can make a warrantless arrest of a felony suspect in a public place. United States v. Santana, 427 U.S. 38, 40-42 (1976) (defendant standing in the open doorway of her house); United States v. Driver, 776 F2d 807, 809 (9th Cir. 1985). However, in the absence of exigent circumstances, authority to make a warrantless arrest ends at the threshold of a private dwelling, and police cannot make a warrantless conconsenual entry into a suspect's residence to make a felony arrest. Payton v. New York, 445 U.S. 573, 590 (1980).

Von Marschner essentially concedes that these officers had probable cause to arrest him,[2] and that he was placed under arrest after he stepped outside his house onto his front patio.[3]

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[2] The district court found that the officers who went to Von Marschner's residence had probable cause to arrest him. This finding is supported by the evidence. There is probable cause for a warrantless arrest if, under the totality of the facts and circumstances known to the arresting officer, a prudent person would have concluded that there was a fair probability that the suspect had committed the crime. United States v. Gonzales, 749 F2d 1329, 1337 (9th Cir. 1984). Here, the police commenced a four-month investigation into the manufacturing and sale of piperidine. While undercover agents conducted surveillance of Earl Hunter, they observed Von Marschner deliver piperidine to Hunter, who later delivered the piperidine to undercover agents. Thereafter, probable cause existed to arrest Von Marschner for conspiracy to possess and possession of piperdine.

[3] At the hearing on the motion to suppress, Von Marschner first testified that he did not recall whether he was told that he was under arrest as he stood in the open doorway or after he stepped outside his residence into the front patio. He the testified that the agents did not enter his house before

However, Von Marschner asserts that the warrantless arrest was invalid because the officers used coercion to lure him outside of his residence, and thus he was constructively arrested when he was standing inside of his house.

A warrantless arrest of a defendant as he stands outside of his private home violates the Fourth Amendment if the defendant emerged in response to coercive police conduct; in such cases the police are deemed to have construc-

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(3) he was arrested, and that he was placed under arrest and handcuffed after he stepped outside. Even if Von Marschner was arrested as he stood in the open doorway of his home, the warrantless arrest would still be valid. See United States v. Santana, 427 U.S. 38, 42 (1976) (the police, with probable cause, can make a warrantles arrest of a suspect standing in the doorway of a private dwelling because one standing in the doorway exposed to public view is in a public place); see also United States v. Whitten, 706 F2d 1000, 1015 (9th Cir. 1983)(although a suspect inside his hotel room, a warrantless arrest at the doorway of a hotel room was valid), cert. denied, 465 U.S. 110 (1984).

tively entered a dwelling and arrested the defendant inside of his house. See United States v. Al-Azzway, 784 F2d 890, 892-93 (9th Cir. 1985), cert. denied, 476 U.S. 1144 (1986). In Al-Azzay, police officers completely surrounded the defendant's house trailer with their guns drawn and ordered him through a bullhorn to leave the trailer and drop to his knees; he was placed under arrest outside of the trailer. Id. at 893. This court concluded that under such circumstances the defendant could hav e reasonably believed that he was not free to leave and thus was under arrest when he was inside the trailer surrounded by armed officers. Id. See also United States v. Johnson, 626 F2d 753, 755-56 (9th Cir. 1980)(from a review of the circumstances, this court found that the defendant could have reasonably believed that he was

not free to terminate the encounter with police and that an arrest had occurred when he stood inside the doorway of his house and was confronted by police agents with their guns drawn), aff'd, 457 U.S. 537 (1982).

The determination of whether an arrest has occurred depends upon an objective evaluation of what an innocent person would have thought of the situation. See Johnson, 626 F2d at 755. The question is whether under all the circumstances, including the extent that the suspect's freedom of movement was curtailed and the degree and type of force used, a reasonable person would conclude that he was under arrest. See United States v. Patterson, 648 F2d 625, 632 (9th Cir. 1981).

Here, Von Marschner claims that when he was inside his house, he was confronted by a show of official

authority that would have led a reasonable person to conclude that he was not free to leave, and that he was coerced from his house by this show of force. Von Marschner emphasizes that the officers knocked loudly and forcefully at his door, and that when he opened the door, he found the agents "had amassed in force upon his doorway and were spilling over into the shadows, questioning him as to his identity."

These circumstances, however, are quite distinct from those in Al-Azzway and Johnson. Here, the police did not surround Von Marschner's residence or confont him with weapons drawn, nor did they order him to emerge from his home. Rather, the agents knocked on Von Marschner's door, identified themselves, and invited Von Marschner to step outside. Under these circumstances, Von Marschner could not

have reasonably believed that he was arrested inside his home. Cf. Al-Azzway, 784 F2d at 892-93. The district court did not err in finding that Von Marschner was not lured or coerced out of his house, and that he was arrested after he stepped outside.

Von marschner next asserts that the law enforcement agents violated his Fourth Amendment rights when they entered his front patio to make a warrantless arrest; he contends that the patio is constitutionally protected curtilage.[4] Von Marschner did not raise this claim at the district court level, and thus there are insufficient facts in the record to determine whether the

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[4] Curtilage is defined as "the land immediately surrounding and associated with the home." See Oliver v. United States, 466 U.S. 170, 180 (1984); see also United States v. Dunn, -- U.S. -- , 107 S.Ct. 1134, 1139 (1987)(listing factors to be considered in determining the extent of the curtilage).

patio is curtilage. This court need not address an issue raised for the first time on appeal. Romain v. Shear, 799 F2d 1416, 1419 (9th Cir. 1986), cert. denied, ___ U.S. ___, 107 S.Ct. 2183 (1987); Bolker v. Commissioner, 760 F2d 1039, 1942 (9th Cir. 1985).[5]

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[5] Von Marschner also contends that the government should have made a good faith effort to obtain an arrest warrant because they had probable cause to arrest him several hours, if not several months, prior to the arrest outside of his residence. Von Marschner's reliance on United States v. Alvarez, 810 F2d 879 (9th Cir. 1987), is misplaced. That case involved a warrantless arrest in a non-public place without exigent circumstances. This court held that even if the government could show the exignet circumstances that "time was of the essence," the government's burden was to demonstrated that a telephone warrant could not have been obtained in time under the procedure authorized by Fed. R. Crim. P. 41(c)(2). Id. at 882-83. Here, the agents did not need a warrant nor exigent circumstances because they arrested Von Marschner outside his house with house with probable cause. See Santana, 427 U.S. at 42.

II. Voluntary Consent To Search

Von Marschner contends that the district court erred in finding that he voluntarily consented to the search of his house. Specifically, he asserts that his alleged oral and written consent was invalid because it resulted from the agents' coercion and threats of force, and because he was not advised of his right to refuse consent.

This court reviews the district court's finding that a defendant's consent to a search was voluntary for clear error. United States v. ALfonso, 759 F2d 728, 740 (9th Cir. 1985). A warrantless search conducted pursuant to a suspect's valid consent is constitutionally permissible. Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973). The suspect's consent must be voluntary; it cannot be coerced by implied threat or covert force. Id. at 228.

The government bears the burden of demonstrating that the defendant's consent was voluntary. Alfonso, 759 F2d at 740. Voluntary consent is a factual question determined by examining the totality of the circumstances. Id. The court may consider such factors as whether the agents threatened the suspect or made any show of force, and the suspect's age, education, intelligence and knowledge of law. See United States v. Mendenhall, 446 U.S. 544, 558 (1980); Watson, 423 U.S. at 424-25. The fact that the suspect was in custody does not necessarily negate voluntarines. Alfonso, 759 F2d at 741.

Here, after Von Marschner stepped outside of his house and was placed under arrest, he was handcuffed and read his Miranda rights. While Von Marschner sat on a bench in his patio, agents entered the house to look for

other suspects and to speak to his wife. Ten to fifteen minutes after Von Marschner was arrested, Agent Barkett asked him to consent to a search of his house. Von Marschner orally consented but asked the agents not to tear up his house. Von Marschner then executed a written consent to search form authorizing the agents to search his residence.

Examining the totality of the circumstances, the district court's finding that Von Marschner freely and voluntarily consented to the search is not clearly erroneous. As the district court emphasized, the arresting officers did not threaten Von Marschner nor display any weapons. Cf. United States v. Perez, 644 F2d 1299, 1303 (9th Cir. 1981)(defendant's consent not freely and voluntarily given when he was approached with weapons drawn). Von Marschner is an intelligent businessman.

Also, as the district court noted, the fact that Von Marschner invoked his right to an attorney indicates that he was capable of making his own intelligent decisions.

Von Marschner emphasizes that Agent Barkett did not advise him of his right to refuse consent to the search of his house. However, although knowledge of the right to refuse consent is one factor to be considered, the failure to advise is not determinative. See Watson, 423 U.S. at 424-25; Schneckloth, 412 U.S. at 232-33.

Moreover, Von Marschner's alleged subjectie fear for his family's safety is insufficient to prove that the agents coerced his consent. Although the court should consider, as one factor, an individual's subjective fear of police brutality, the crucial issue is whether a person in the defendant's position

would reasonably have feared for his personal safety and the destruction of his property. See United States v. Castrillon, 716 F2d 1279, 1282 n.1 (9th Cir. 1983). Von Marschner may have subjectively feared the police. However, the agents did not threaten or force him to consent to the search. Thus, under these circumstances, a reasonable person in Von marschner's position would not have feared for his safety and the destruction of his property. See id.

The district court properly denied Von Marschner's motion to suppress and the judgment is AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 86-5334

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

GERT VON MARSCHNER,
Defendant-Appellant.

ORDER

Before: GOODWIN, BARNES and KILKENNY, Circuit Judges

The panel has voted to deny appellant's petition for rehearing.

Judge Goodwin has voted to reject the suggestion for rehearing en banc and Judges Barnes and Kilkenny so recommend.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 86-5334

UNITED STATES OF AMERICA,
Plaintiff-Appellee

vs.

GERT VON MARSCHNER,
Defendant-Appellant.

APPEAL from the United States District Court for the Central District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this COurt, that the judgment of the said District Court in this Cause be, and hereby is AFFIRMED.

Lodged Sept 12 1988

Filed Sept 13, 1988

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On November 10, 1988, I served the within Petition for Writ of Certiorari in re: "Gert Von Marschner vs. United States of America" in the United States Supreme Court, October Term 1988;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Mr. Charles Fried
Solicitor General
United States Department of Justice
Washington, D.C. 20530

Robert C. Bonner
United States Attorney
1400 U.S. Courthouse
312 N. Spring Street
Los Angeles, CA 90012

All Parties required to be served have been served.

I certify under penalty of perjury, that the foregoing is true and correct.

Executed on November 10, 1988, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA